IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 7618 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HIRENKUMAR @ SONI CHANDRAKANT SATHAM - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

MR ND NANAVATI Ld. Sr. Advocate for NANAVATY ADVOCATES for Petitioner.

MR KP RAVAL Ld. APP for Respondent.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 24/08/2005

ORAL JUDGMENT

1. The applicant, having been arrested on 31st October,2004 in connection with an offence registered with Panigate Police Station of Vadodara, vide C.R.No.I-386 of 2004, has moved this application under Section 439

of Criminal Procedure Code for his release on bail.

2. This application is a successive bail application preferred for the second time after the charge-sheet. Earlier, the applicant had preferred Criminal Misc. Application No.12029 of 2004 before filing of the charge-sheet, which was withdrawn with a view to approach the Sessions Court with similar application, as charge-sheet was filed during the pendency of that application. Later on, the applicant preferred Criminal Misc. Application No.3226 of 2005 after the charge-sheet was filed. The said application was considered on merits by this Court and was rejected by order dated 17th June,2005. This Court, while rejecting the application, took into consideration the fact that Panchnama drawn by Investigating Agency indicates that a large number of documents and other material including manipulated HSC and SSC mark-sheets, fixed deposits etc. have been seized from custody of the applicant.

3. This successive bail application has been preferred by the applicant on the ground that on perusal of Investigation papers tendered with the charge-sheet, it is found that the applicant was arrested subsequent to the drawing of Panchnama, whereunder the said documents

are alleged to have been recovered from him and barring this, there is no other evidence against him. The Panchnama would, therefore, not meet with the requirements of Section 27 of the Evidence Act, as the applicant was not in custody of police when the Panchnama was drawn, he having been arrested subsequently and, therefore, his case for bail may be given a re-look.

4. Learned Senior Advocate Mr.Nanavati for the applicant has highlighted the fact that the Panchnama under which the documents are recovered from the applicant came to be drawn on 30th October,2004 between 18.30 and 22.30 hrs., whereas the applicant has been arrested on 31st October,2004. He has also drawn attention of this Court to Section 27 of the Evidence Act which provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, **in the custody of a Police Officer**, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Mr.Nanavati has emphasized on words “in custody of a police officer” and submitted that the applicant was arrested on 31st October,2004, whereas the Panchnama was drawn on 30th October,2004 and, therefore, the applicant cannot be said

to be in custody of police officer as envisaged under Section 27 of the Evidence Act. Mr.Nanavati submitted that the Panchnama is the only piece of evidence against the applicant which weighed with this Court in rejecting his earlier bail application on merits. He submitted that the case of the applicant for bail may, therefore, be reconsidered.

5. Learned APP Mr.Raval has opposed this application. He submitted that this is a successive bail application. There is no change of circumstance which may require the applicant's case to be reconsidered. The charge-sheet papers were available with the applicant when last bail application was heard and decided. Contention could and ought to have been raised at that time. That apart, the applicant was under surveillance of police when the Panchnama was drawn. He submitted that the Panchnama is of recovery and can be said to have been drawn under Section 102 of Criminal Procedure Code and Section 27 of the Evidence Act would not be attracted. He, therefore, submitted that bail may be rejected.

6. This Court has taken into consideration the rival side contentions.

7. The contentions that are raised by learned Senior Advocate for the applicant proceed on a premise that the Panchnama whereunder the documents have been recovered is a Panchnama under Section 27 of the Evidence Act and, therefore, requirements of Section 27 of the said Act as to the person accused of an offence being in custody of a police officer is required to be fulfilled and that if that is not shown, the Panchanma would be rendered defective. The contention is also founded on a premise that because the applicant is alleged to have been arrested on 31st October,2004 i.e. subsequent to drawal of the Panchnama, he cannot be said to be in custody of a police officer. It would, therefore, be necessary for this Court to examine questions; (i) whether the Panchnama can be said to be one under Section 27 of the Evidence Act and (ii) whether the applicant cannot be said to be in custody of a police officer because he is arrested subsequent to the Panchnama. Last but not the least, the impact of the situation on question of bail of the applicant will also have to be examined.

8. A look at Section 27 of the Evidence Act would indicate that there has to be a discovery of any fact in consequence of information received from a person accused of any offence, in the custody of a police officer.

Differently put, there has to be some disclosure of information by such person which leads to discovery of certain fact. If in this background, the Panchnama is examined, prima facie, there appears not any disclosure of information by the applicant forming part of the Panchnama. Prima facie, therefore, it is difficult to accept the contention raised on behalf of the applicant that the Panchnama is one under Section 27 of the Evidence Act. This Court may hasten to add that these observations are purely prima face and do not conclusively decide the question whether, this Panchnama is drawn under Section 27 of the Evidence Act or not. It would be a matter to be decided by the Trial Court after the evidence is led. But, prima facie, for the purpose of this application, this Court is of the opinion that Panchnama cannot be said to be one under Section 27 of the Evidence Act. As a consequence, the contention regarding non-fulfillment of requirements of Section 27 of the Evidence Act cannot be accepted.

9. Apart from the question, whether the Panchnama can be said to be a Panchnama under Section 27 of the Evidence Act or not, the question that requires consideration is whether, applicant can be said to be not in custody of a police officer, because of his

arrest subsequent to the drawal of Panchnama taking the Panchnama to be one under Section 27 of the Evidence Act. It was contended by learned Senior Advocate Mr.Nanavati that the custody starts only after the arrest.

9.1 It has to be kept in mind that ordinarily a person suspect of an offence remains suspect till prima facie some material is found against him. To ascertain whether there is substance in accusation against him or not, a person is required to be interrogated. During that course, the person is under control of or surveillance of the Investigating Agency or officer. Word “custody” appearing in Section 27 of the Evidence Act has to be given a broader meaning rather than a meaning that it would be only after formal arrest that person can be said to be in custody. In such eventuality, there exists a restriction on movements of such person, though element of confinement or detention may not be present. Formal arrest would not be necessary to constitute 'custody' contemplated under Section 27 of the Act. In this regard, following decision can be profitably be used:

(i) Chhotey Lal Vs. State of Uttar Pradesh (AIR 1954 ALLHABAD 687), wherein a view is taken that, “the word 'custody' in Section 27 does not

mean formal custody. An accused is in Police custody within the meaning of the Section when he is under surveillance of Police and cannot break away from the company of Police Officer and get away".

(ii) Bibhachha alias Bibachha Baitharu Vs. State of Orissa (1998 Cri.L.J. 1553 Orissa) (D.B.), wherein it is held that, "the word 'custody' as contemplated under Section 27 of the Evidence Act, does not mean formal custody but includes such state of affairs in which the accused can be said to be in the hands of Police Officer, even under some surveillance. The word 'custody' as contemplated, would mean surveillance or restriction on the movement of the person concerned which can be completed in the event of arrest of the person. The concept of being in custody, therefore, cannot be equated with the concept of formal arrest".

(iii) State of Uttar Pradesh Vs. Deoman Upadhyaya (AIR 1960 SC 1125), the Apex Court took a view that "when a person not in custody approaches a Police Officer investigating an offence and offers to give an information leading to the

> discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the Police... A person directly giving to a Police Officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the 'custody' of the Police Officer within the meaning of Section 27 of the Indian Evidence Act..".

10. Thus, it is clear that term 'custody' appearing in Section 27 of the Evidence act has to be read in a wider perspective and cannot be given a narrow meaning. For the purpose of this Section, formal arrest is not necessary. Even supervision or surveillance of police is enough to constitute a custody contemplated under Section 27 of the Evidence Act. Where a man voluntarily approaches the police and divulges some information leading to discovery, he can be said to be in custody of police officer for purpose of Section 27 of the Evidence Act. Necessarily, a man called, or intercepted by police and under control, supervision or surveillance of police would also be a person in 'custody of police officer' within the meaning of Section 27 of the Act. Words

'custody of Police Officer' in Section 27 of Evidence Act has to be read to mean that the man must be under control or surveillance of police.

10.1 The contention that because the requirements of Section 27 of the Act are not fulfilled, the Panchnama would be bad, cannot be accepted even if it is accepted that the Panchnama is under Section 27 of the Evidence Act.

11. What now calls for consideration is what could be the impact of the Panchnama by which documents have been recovered. Prima facie, there appears substance in contention raised by learned APP Mr.Raval that this Panchnama has to be one under Section 102 of Criminal Procedure Code. This Panchnama indicates that a large number of documents and other material including manipulated HSC and SSC Board mark-sheets, fixed deposits etc. have been seized which reflects prima facie involvement of the applicant in offence punishable under Sections 467, 468 etc. of IPC, which are punishable with the imprisonment of life. This Panchnama forms part of investigation papers as material against the applicant. What would be the impact of such Panchnama would be a matter of evidence to be decided by the Trial Court. But,

prima facie, it has to be recorded that involvement of the applicant in a serious offence is prima facie made out of this Panchnama. Such recovery Panchnama has been accepted to be an incriminating circumstance by a Division Bench of this Court in the case of Harshad @ Hasmukh Bhanabhai Vs. State of Gujarat (1999 (2) GLR 1132). As such, at this stage of bail, the Panchnama in question cannot be ignored. In fact, it did weigh with this Court on earlier occasion as can be seen from the order passed therein. There is no reason to take a different view of the matter in absence of any other change of circumstance.

12. At the end, it may be stated that this being a successive bail application, it can be entertained only if a subsequent change in circumstance are shown by the applicant. The change in circumstance or fact situation must be substantial and not cosmetic. (State of Maharashtra Vs. Captain Buddhikota Subha Rao, AIR 1989 SC 2292) and as such, it has to be seen whether, the points canvassed on behalf of the applicant can be said to be a substantial change in circumstance.

12.1 The point that is canvassed is on basis of the charge-sheet papers which includes the Panchnama in

question and the date and time of arrest. Both these circumstances and material were very much available to the applicant when his earlier bail application being Criminal Misc. Application No.3226 of 2005 was preferred, heard and decided and this point could and ought to have been raised at that point of time. This contention cannot be said to be based on a subsequent or substantial change in circumstance which may call for re-consideration of the question of bail of the applicant and the application, therefore, must fail on this ground as well.

13. None of the contentions raised by learned Senior Advocate for the applicant deserve acceptance. The application, therefore, must fail and stands dismissed. Notice discharged.

(A.L.DAVE,J.)

(vipul)